

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 34

Docket No. DC-0842-01-0304-X-1
DC-0842-02-0233-X-1

Michael K. Brown,

Appellant,

v.

Office of Personnel Management,

Agency.

OPM Claim No. CSA 8 100 393

February 19, 2010

Michael K. Brown, Shreveport, Louisiana, pro se.

Cynthia Reinhold, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This case is before the Board pursuant to a recommendation of the administrative judge finding the agency in noncompliance with the final Board orders on the merits of these two appeals. For the reasons set forth below, we find that the agency is now in compliance and DISMISS this matter as MOOT.

BACKGROUND

¶2 In 2001, the appellant appealed a July 23, 2001 reconsideration decision issued by the Office of Personnel Management (OPM) finding that he had been overpaid \$46,695.10 in disability annuity benefits under the Federal Employees' Retirement System (FERS). MSPB Docket No. DC-0845-01-0304-1-2. The appellant also appealed OPM's October 22, 2001 reconsideration decision designating the Maryland Department of Health and Mental Hygiene as the representative payee to receive his annuity payments. MSPB Docket No. DC-0842-02-0233-1-1. On interlocutory appeal in those cases, the Board issued an opinion and order affirming dismissal of the appellant's appeals without prejudice with no requirement to establish a date certain for refiling or a reporting schedule. *Brown v. Office of Personnel Management*, [94 M.S.P.R. 331](#), ¶¶ 12-14 (2003). The Board held that the appellant could refile his appeals only when he regained his competency or agreed to representation. *Id.* at ¶ 12.

¶3 In its interlocutory ruling, the Board stated that OPM could not collect the overpayment while the appellant's appeals were dismissed without prejudice. *Id.* at ¶ 13. The September 29, 2003 initial decisions in the two appeals ordered "OPM not to collect the appellant's alleged overpayment" until the appellant regained competency or agreed to representation.¹ MSPB Docket No. DC-0842-01-0304-I-4, Initial Decision, Sept. 29, 2003, at 4; Docket No DC-0842-02-0233-I-2, Initial Decision, Sept. 29, 2003, at 4. The initial decisions became the final decisions of the Board when neither party filed a petition for review.

¶4 On September 14, 2009, the Merit Systems Protection Board's Washington Regional Office received a petition for enforcement from the appellant in which he complained that OPM had improperly collected part (\$24,270.26) of the alleged overpayment contrary to the final Board orders. MSPB Docket Nos. DC-

¹ The administrative judge issued separate initial decisions in the two appeals, but both contained the identical order to OPM.

0842-01-0304-C-1 and DC-0842-02-0233-C-1, Compliance File (CF), Tab 1. After affording the parties the opportunity to make additional submissions, the administrative judge found that OPM had collected part of the alleged overpayment and that doing so was contrary to the final Merit Systems Protection Board orders in this matter.² *Id.*, Tab 13 at 6. The administrative judge recommended that the Board order OPM to fully comply with the September 29, 2003 final order and repay the \$24,270.26 in FERS disability retirement payments it had collected from the appellant's retirement payments. *Id.*

ANALYSIS

¶5 It is the agency's burden to prove its compliance with a Board order. *See New v. Department of Veterans Affairs*, [106 M.S.P.R. 217](#), ¶ 6 (2007), *aff'd*, 293 F. App'x 779 (Fed. Cir. 2008); *Donovan v. U.S. Postal Service*, [101 M.S.P.R. 628](#), ¶¶ 6-7 (2006), *review dismissed*, 213 F. App'x 978 (Fed. Cir. 2006). The appellant may rebut the agency's evidence of compliance by making specific, nonconclusory, and supported assertions of continued noncompliance. *See New*, [106 M.S.P.R. 217](#), ¶ 6; *Donovan*, 101 M.S.P.R. 628, ¶ 7.

¶6 In a December 10, 2009 submission in the instant case, OPM asserted that it had taken all of the actions directed by the administrative judge in his compliance recommendation. MSPB Docket Nos. DC-0842-01-0304-X-1, DC-0842-02-0233-X-1, Compliance Referral File (CRF), Tab 5 at 4. In support of its assertion, OPM provided a copy of two computerized payment authorizations reflecting a total payment to the appellant of \$24,270.26. *Id.* at 5-6. Although the appellant filed a lengthy submission with the Board subsequent to the agency's filing, he did not address the agency's compliance actions. CRF, Tab 6.

² In a September 23, 2009 order, the administrative judge joined the appellant's petition for enforcement of MSPB Docket Nos. DC-0842-01-0304-C-1 and DC-0842-02-0233-C-1. CF, Tab 3.

¶7 Based on the agency's evidence of compliance, and the appellant's failure to contest that evidence, we find that the agency is in compliance. *See Holler v. Department of the Navy*, [94 M.S.P.R. 323](#) ¶ 8 (2003) (finding that an agency's evidence of compliance was bolstered by the appellant's lack of objection to the evidence); *Cox v. U.S. Postal Service*, [87 M.S.P.R. 575](#), ¶ 3 (2001) (finding compliance based on an agency's evidence and the appellant's failure to object).

ORDER

¶8 The petition for enforcement is dismissed as MOOT. This is the final decision of the Merit Systems Protection Board in this compliance matter. Title 5 of the Code of Federal Regulations, section 1201.183(b)(c) ([5 C.F.R. § 1201.183\(b\)\(3\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.